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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KHUE and  
KIM-LIEN NGUYEN.

KHUE NGOC NGUYEN,

Appellant,

v.

KIM-LIEN HOANG NGUYEN,

Respondent.

D052712

(Super. Ct. No. D458947)

APPEAL from an order of the Superior Court of San Diego County, Gonzalo Curiel, Judge. Affirmed.

Khue Ngoc Nguyen (Khue) appeals an order granting the motion of Kim-Lien Hoang Nguyen (Kim) for an award of attorney fees incurred in maintaining her motion to set aside the 2000 judgment dissolving their marriage and dividing their community property. On appeal, Khue contends the trial court abused its discretion in awarding Kim attorney fees and in determining the amount of fees awarded.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

In 1986 Khue and Kim were married. In 2000 Khue filed a petition for dissolution of their marriage. In September 2000, the trial court entered a judgment dissolving Khue and Kim's marriage and awarding a San Diego property to Khue and a Temecula property to Kim.

In October 2006, Kim filed a motion to set aside the 2000 judgment's property division and spousal support portions on the grounds of Khue's perjury and fraud. (Fam. Code, § 2122, subds. (a), (b).)<sup>2</sup> (*Nguyen I, supra*, at pp. 4-5.) Her motion also requested an award of attorney fees and costs incurred in maintaining the motion. In October 2007, the trial court issued an order granting in part Kim's motion to set aside the judgment. (*Id.* at p. 5.) On December 23, 2008, we affirmed that order on appeal. (*Id.* at p. 17.)

On November 27, 2007, Khue filed an income and expense declaration in which he stated the fair market value of real and personal property he owned, less debts owed, was \$550,000. He also stated he obtained a \$150,000 loan. In his 2006 federal income tax return attached to his declaration, he stated he received \$79,600 in gross rental income in 2006 but, after deduction of expenses, received only \$2,124 in net rental income.

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<sup>1</sup> In presenting the factual and procedural background in this case, we rely in part on the factual and procedural background set forth in our opinion in *In re Marriage of Nguyen* (Dec. 23, 2008, D051966) [nonpub. opn.] (*Nguyen I*), which we incorporate by reference. In *Nguyen I*, we affirmed the trial court's order granting in part Kim's motion to set aside the 2000 judgment. For a more complete background, refer to *Nguyen I*.

<sup>2</sup> All statutory references are to the Family Code.

On January 14, 2008, in support of her motion for attorney fees, Kim lodged copies of monthly billing statements from her attorney, Marisa L. Montgomery, for services rendered from October 2006 through November 2007. As of December 5, 2007, Kim owed her attorney a total of \$15,781.55.

On January 16, Khue filed a declaration in opposition to Kim's motion for attorney fees, in which he stated Kim's income and expense declarations showed she was employed and earned at least \$3,000 per month. Although he has a real estate license, Khue claimed he had not been able to make a living in the real estate business. He stated: "[T]o retain an attorney, pay for my living expenses and to maintain my property, I had to secure a loan from Linda Hoang, a friend of both myself and [Kim]. I borrowed \$150,000 from Ms. Hoang." He asserted Kim "should not be awarded attorney's fees, as she has shown no need for an award and I do not have the ability to pay an award of attorney's fees or costs." He further asserted: "I have absolutely no assets, liquid or otherwise, that would allow me to pay for any of [Kim's] attorney's fees or costs."

On January 18, the trial court heard oral arguments of the parties and granted Kim's motion, awarding her \$7,500 in attorney fees. On February 13, the court issued a written order awarding Kim \$7,500 in attorney fees, payable to her attorney (Montgomery). Khue timely filed a notice of appeal challenging that order.

## DISCUSSION

### I

#### *Attorney Fee Awards under Sections 2030 and 2032 Generally*

In a marital dissolution proceeding or any proceeding subsequent to entry of a related judgment, a trial court may order payment of attorney fees and costs as between the parties based on their "respective incomes and needs" and "respective abilities to pay," to "ensure that each party has access to legal representation to preserve each party's rights." (§ 2030, subd. (a); *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.) The amount of an award shall be "whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (§ 2030, subd. (a)(1).) "The purpose of such an award is to provide one of the parties, if necessary, with an amount adequate to properly litigate the controversy. [Citations.]" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629.) Section 2030, subdivision (a)(2), provides: "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay."

A court may award attorney fees under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) Section 2032, subdivision (b), provides: "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable

each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." Furthermore, "[t]he court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income." (§ 2032, subd. (c).)

"The parties' 'circumstances' as described in section 4320 include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties." (*In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at p. 630, fn. omitted.) Furthermore, "[i]n assessing one party's relative 'need' and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, *assets*, and abilities, *including investment and income-producing properties*. [Citation.]" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167, italics added.)

"[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]'

[Citation.]" (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) Furthermore, "the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion. [Citations.]" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827, fn. omitted.)

## II

### *Award of Attorney Fees*

Khue contends the trial court abused its discretion by awarding Kim attorney fees and costs incurred in maintaining her motion to set aside the 2000 judgment.

#### A

At the January 18, 2008, hearing, his counsel stated Khue's income and expense declaration showed he had equity of \$550,000 in properties he owned. That declaration also showed Khue received gross annual rental income of \$79,600 but, after expenses, earned only \$2,124. It also showed he received a \$150,000 loan.<sup>3</sup>

Kim's counsel stated Kim's income and expense declaration filed on January 4 showed her gross salary was \$3,154 per month. She also earned bonuses of about \$276 per month. Her declaration showed her expenses were \$4,674 per month, although Khue disputed some of those expenses. The trial court noted that even were it to deduct \$1,800 of disputed expense amounts, Kim's expenses would still be \$2,874 per month.

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<sup>3</sup> Kim's counsel argued Khue stated at his deposition that he had sold an interest in one of his properties to Hoang, which sale arguably was the source of the \$150,000 Khue received from her. Thus, it apparently was Kim's position that the \$150,000 Khue received from Hoang was not from a loan, but from the sale of an interest in that property.

The trial court stated:

"At this point, looking at [section] 2030 and recognizing that the court is directed to ensure that each party has access to legal representation to preserve their rights by ordering reasonable attorneys' fees, and in looking at [section] 2032[,] it sets forth that I should look at the respective income[s] and needs of the parties and any factors affecting the parties' abilities to pay, I'm convinced that [Khue] is in a superior position, compared to [Kim], to pay some attorneys' fees. And that's based upon the fact that even though she makes [\$3,134] per month, based upon the expenses which I'm going to determine are reasonably in the area of \$2,874, that with all other factors taken into account, taxes, that she doesn't have much, if anything, left over for attorneys' fees.

"Meanwhile, because of the amount of equity available to [Khue], he can borrow, he can do something so that [Kim] can be in a position to zealously seek to have a fair and reasonable resolution in this case."

The court then requested further argument regarding the fair and reasonable amount of the attorney fees and costs to be awarded, which we discuss in part III, *post*.

## B

Khue asserts the trial court abused its discretion by awarding Kim attorney fees and costs in maintaining her motion to set aside the 2000 judgment based on its erroneous finding that Kim had a greater relative need for an award of attorney fees. Khue argues Kim had greater liquid assets and income than he did. He argues he has been unable to sustain a living in the real estate business. In awarding Kim attorney fees, Khue argues the trial court ignored that evidence of his inability to pay Kim's attorney fees. In particular, he argues that had the court properly considered his income and expense declaration and tax information, it could not have reasonably concluded he had an ability to pay Kim's attorney fees. He also argues the court ignored his obligations to pay \$400

per month in child support and to pay his own attorney fees in defending Kim's motion to set aside the judgment.

There is nothing in the record showing the trial court ignored his income, tax information, or obligations to pay child support or his own attorney fees. Rather, the record supports the reasonable inference the trial court implicitly considered that evidence but, on its consideration of that evidence together with other evidence, found Kim had a greater respective need for an attorney fee award and Khue had a greater respective ability to pay her attorney fees. As noted above, Khue's income and expense declaration showed he had equity of \$550,000 in properties he owned. That declaration also showed Khue received gross annual rental income of \$79,600, although, after expenses, he earned net rental income of only \$2,124. It also showed he received \$150,000 in loan proceeds (if not sale proceeds). Based on Khue's much greater net assets (at least \$550,000) and liquidity (including the proceeds of the \$150,000 loan), the trial court could reasonably conclude Khue had a greater respective ability to pay Kim's attorney fees even though she may have had greater net income.

A trial court should not focus solely on income, but should also consider assets and other financial resources, including investment and income-producing properties, that can be used to pay attorney fees. (§ 2032, subd. (b); *In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at p. 630; *In re Marriage of Drake*, *supra*, 53 Cal.App.4th at p. 1167.) Furthermore, in awarding attorney fees to Kim, the trial court expressly referred to sections 2030 and 2032 and their requirement that it consider the parties' respective incomes and needs, and any factors affecting their abilities to pay. The court expressly



found Kim had little income, after her expenses, to pay attorney fees. In comparison, it found the amount of equity available to Khue gave him a greater ability to pay Kim's attorney fees. Based on that record, we conclude the trial court did not abuse its discretion by concluding Khue should pay Kim's attorney fees and costs in maintaining her motion to set aside the 2000 judgment. (*In re Marriage of Sullivan*, *supra*, 37 Cal.3d at pp. 768-769.) The record reflects the trial court actually exercised its discretion and considered the statutory factors in exercising its discretion to award Kim attorney fees. (*In re Marriage of Braud*, *supra*, 45 Cal.App.4th at p. 827.)

### III

#### *Amount of Attorney Fee Award*

Khue contends the trial court abused its discretion in determining \$7,500 as the amount of attorney fees to be awarded to Kim.

#### A

After determining Kim should be awarded attorney fees, the trial court asked counsel to argue regarding what amount of attorney fees would be a fair and reasonable amount to be awarded. Kim's attorney stated she sought an award of \$15,781. Khue's attorney argued Kim's motion to set aside was a simple motion and should not have cost \$15,000 in fees. He also questioned whether certain items reflected in the billing statements of Kim's attorney were relevant or necessary to maintain her motion to set aside. Kim's attorney represented to the court that her billing rate was \$250 per hour and her paralegal's rate was \$125 per hour. Khue's attorney stated his billing rate was \$200 per hour. Kim's attorney stated she had six years of experience as a family law attorney

and, before that, 10 years of experience as a paralegal. She also stated her paralegal had 30 years of experience. Kim's attorney further stated the motion to set aside the judgment in this case was not a standard motion and required creativity, legal research, and discovery. In response to the court's inquiry, Khue's attorney stated his client had incurred about \$6,000 in attorney fees in defending against Kim's motion to set aside.

The trial court stated:

"The question becomes does [Kim] need an attorney? And in my view of the file, it appears the answer is yes. Does she have the resources herself to pay for an attorney? I don't believe that she does, based upon the financial documentation that's been provided. Does Mr. Nguyen have the financial wherewithal, based upon the large amount of equity that he has available to him? And I'm going to conclude yes.

"And so ultimately, at this point--and this is without prejudice to having a future request to have additional attorneys' fees ordered--I will direct that the sum of \$7500 be made payable to Ms. Montgomery for her attorneys' fees.

"At this point, obviously, there will be a partial coverage of the attorneys' fees. And as I stated, that's without prejudice. And the court retains jurisdiction on what will be reasonable attorneys' fees throughout this proceeding. But at the same time, in order to permit some type of payment to be afforded to Ms. Montgomery so that she can continue without basically doing this for free, that's what the court's order will be at this time."

When Kim's counsel inquired whether Khue's payment of attorney fees would be "due forthwith," the trial court replied, "Yes." Khue's counsel objected to payment forthwith, arguing that if Khue could not refinance his properties to get equity out of them, he would have no ability to pay Kim's attorney fees. Kim's counsel replied that Khue had already obtained \$150,000 from Hoang. The trial court found Khue was in a superior

position to pay Kim's attorney fees, but noted it was "not directing him to place any encumbrances upon the property." The court found Khue "has the financial wherewithal to comply with this court's order."

## B

Khue asserts the trial court abused its discretion in determining \$7,500 to be the amount of attorney fees and costs awarded to Kim because the court erred in finding he had an ability to pay her attorney fees and costs. He also argues the court did not inquire as to the reasonableness of the amount of fees. He argues the court did not consider the factors set forth in *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, and only made a conclusory finding regarding his ability to pay Kim's attorney fees.

The record supports the reasonable inference that the trial court considered the parties' respective incomes, expenses, and assets in determining Khue's ability to pay Kim's attorney fees. Given Khue's failure to request a statement of decision, we make all implied findings necessary to support the court's order to the extent those findings are not inconsistent with the record. (Cf. *In re Marriage of McQuoid* (1991) 9 Cal.App.4th 1353, 1361.) Accordingly, the court was not required to specifically address each item of the parties' incomes, expenses and assets, or otherwise specifically state how it determined Khue had the greater financial resources or other ability to pay Kim's attorney fees.<sup>4</sup>

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<sup>4</sup> The trial court was not required to expressly address each factor set forth in *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at page 870. Rather, because Khue did not request a statement of decision, we presume the trial court implicitly considered those

Furthermore, there is ample evidence in the record regarding the experience of Kim's attorney and the nature and extent of the services she rendered in maintaining Kim's motion to set aside the judgment. Although the court did not expressly find \$250 per hour was a reasonable rate charged by Kim's attorney, the court could rely on its own experience and knowledge in determining the reasonable value of the services rendered by Kim's attorney in maintaining the motion to set aside the judgment. (*In re Marriage of Keech*, *supra*, 75 Cal.App.4th at p. 870; *In re Marriage of McQuoid*, *supra*, 9 Cal.App.4th at p. 1361.)

The record also supports the reasonable inference that the trial court actually exercised its discretion in determining the amount of attorney fees to be awarded and considered the relevant factors in determining that amount. (*In re Marriage of Braud*, *supra*, 45 Cal.App.4th at p. 827.) The court expressly referred to sections 2030 and 2032 and their requirement that it consider the parties' respective incomes and needs, and any factors affecting their abilities to pay. Furthermore, the court noted the amount of Khue's equity in properties he owned (i.e., \$550,000), and was aware of the \$150,000 in loan proceeds he received from Hoang. Therefore, the record supports the inference that the court found Khue had the financial resources and ability to pay Kim \$7,500 in attorney fees. Furthermore, by awarding Kim only \$7,500 out of the \$15,781 amount requested, the record supports the inference that the court exercised its discretion in determining the amount of the award.

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factors in making its determination regarding the amount of attorney fees it awarded to Kim.

The record does not show the court determined the amount of attorney fees to be awarded by splitting the amount requested in half. (Cf. *In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 300-304.) Although \$7,500 is approximately one-half of the \$15,781 amount requested by Kim, we cannot presume the court determined the \$7,500 amount by simply dividing the requested amount in half (absent anything in the record showing otherwise). Rather, we make all presumptions and intendments favorably to support the challenged order.

Although Khue apparently argues the trial court erred by considering the amount of attorney fees (i.e., \$6,000) he paid his attorney in defending against Kim's motion to set aside the judgment, he does not cite any case holding a trial court abuses its discretion by considering that factor in addition to other relevant factors in determining the amount of attorney fees to be awarded to the other party. *In re Marriage of Keech, supra*, 75 Cal.App.4th at pages 869-870 does not hold otherwise, and even were it to do so, we would disagree with it and decline to follow it. The record in this case does *not* support a conclusion the trial court decided to award Kim at least \$6,000 in attorney fees because that is the amount Khue incurred in defending against her motion. (Cf. *ibid.*)

Finally, Khue argues the trial court erred by awarding an excessive amount of attorney fees because the record shows Kim's attorney "overlitigated" the case. Based on the record in this case, we conclude the trial court did not err by impliedly finding Kim's attorney did not overlitigate the case and, instead, the legal services rendered were reasonable and necessary to maintain Kim's motion to set aside the judgment. (Cf. *In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1524.) The record shows Kim's

motion to set aside the judgment was *not* a "simple" or standard motion and required significant creativity, legal research, and discovery by Kim's attorney to maintain the motion to set aside the judgment based on Khue's fraud and perjury. Furthermore, to the extent the trial court found certain items in the billing statements of Kim's attorney were neither reasonable nor necessary, we infer the court's reduction of the \$15,781 amount requested to the \$7,500 amount awarded reflects the court's decision to award Kim attorney fees for only those services reasonable and necessary to maintain the motion to set aside the judgment. We conclude the trial court did not abuse its discretion by determining \$7,500 as the amount of attorney fees to be awarded to Kim.

#### IV

##### *Manner and Timing of Payment*

Khue contends the trial court abused its discretion by ordering him to pay the attorney fee award in a lump sum forthwith, rather than in installments over time. He argues that because he had no savings or liquid assets and insufficient income, the court erred by concluding he had the ability to pay the entire \$7,500 amount in a lump sum forthwith. Kim's counsel stated Khue had received \$150,000 from Hoang. The trial court found Khue was in a superior position to pay Kim's attorney fees, but noted it was "not directing him to place any encumbrances upon the property." The court found Khue "has the financial wherewithal to comply with this court's order." Based on the record, we conclude the trial court did not abuse its discretion by concluding Khue had the ability to pay, and ordering him to pay, the attorney fees in a lump sum forthwith. Given Khue's \$550,000 in equity in his properties and \$150,000 in loan (or sale) proceeds received

from Hoang, the court could reasonably conclude Khue had the ability to pay \$7,500 in Kim's attorney fees in a lump sum forthwith.<sup>5</sup>

DISPOSITION

The order is affirmed.

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McDONALD, J.

WE CONCUR:

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BENKE, Acting P. J.

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HUFFMAN, J.

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<sup>5</sup> Although Khue also contends Kim failed to comply with her disclosure obligations by using the term "none" instead of a dollar amount (i.e., \$0) in her income and expense declaration, we consider that contention to be waived on appeal because he does not argue, much less show, that her purported noncompliance was prejudicial to him (i.e., a different result probably would have occurred had she complied).